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David F. Hoch	:	Date Issued: January 18, 2000
Complainant	:	
v.	:	Case No. 1998-CAA- 12
Clark County Health District	:	
Respondent	:	

....

Before: Stuart A. Levin,
Administrative Law Judge

For Complainant:
Richard Segerblom, Esq.
Sangeeta Singal, Esq.

For Respondent:
Mark J. Ricciardi, Esq.

DECISION & ORDER

This is a proceeding convened under the jurisdiction of the Clean Air Act (CAA), 42 U.S.C. § 7622, as amended, and the regulations promulgated and published at 29 CFR Part 24 to implement the Act. By letter dated April 1, 1998, David F. Hoch filed a complaint with the Department of Labor alleging that he was the target of discriminatory action arising out of activities protected by the Act when he was transferred and denied access to certain computer programs by his employer, the Clark County Health District, Clark County, Nevada.

Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, U.S. Department of Labor, determined in an undated letter that discrimination in violation of the Act was a factor in the decision to deny Hoch access to certain computer programs. By letter dated August 3, 1998, the Employer requested a formal hearing which convened at Las Vegas, Nevada, on October 5 and 6, 1999.

At the hearing, the parties were afforded an opportunity to present evidence and argument, and, thereafter, filed briefs and responses, the last of which was filed November 19, 1999. The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and, after careful analysis of the entire record in light of the arguments presented, the regulations, statutory provisions, and applicable case law.

FINDINGS OF FACT

1. The Clark County Health District (CCHD) was created as the governmental entity authorized to supervise public health programs in Clark County, Nevada, and the cities within the county. One of its divisions includes the Environmental Health Division from which an Air Pollution Control Division (APCD) emerged. During times relevant to this proceeding, Dr. Otto Ravenholt was CCHD's Chief Health Officer and its Air Pollution Control Officer. He served as CCHD's top executive for 35 years, until his retirement on May 8, 1998, Tr. 142-3. He served at the pleasure of the Board of Health which supervised the District. Tr. 221-223.

2. David F. Hoch is employed by the ACPD as a Permit Specialist II, in the Title 5 Operating Permit Section under the supervision of David Lee. Tr. 81. He has worked for APCD for eight years. TR. 53-54. He has a degree in aeronautical science, Tr. 102.

3. Sometime in early 1990's, Hoch was assigned informal management responsibility for APCD's Emission Reduction Credit Program (ERC). Tr. 227. The ERC concept involves an emissions inventory, Tr. 72, and is designed to allow communities to facilitate growth in industry while reducing the level of air pollution in the Las Vegas Valley. Tr. 54. The ERC program allowed firms to obtain from municipalities, and in some instances from each other, credits and offsets for paving roads to reduce dust emissions. Two credit tons are required to offset each ton of actual air pollution. Credits can be purchased from the county at $615 each or at a discount on the open market for about $330 from firms which may no longer have a use for their accumulated credits. Hoch's duties included assessing the pollution reduction requirements of individual companies, quantifying road paving projects, and functioning as a bank to keep track of firms which needed reductions and those which created reductions. Tr. 54. The ERC information received by APCD is stored in the ERC computer database.

4. The ERC Program, at times relevant to this proceeding, was contained in Section 12 of the Clark County Health District Regulations. It was promulgated and

enforced locally and was not effective as a measure in the State Implementation Plan until it was approved by the Federal EPA effective June 10, 1999. RX 150. Hoch, from the earliest days of his involvement with the ERC, understood that the ERC was an element of the Clark County Health District Plan to attain the PM-10 Standard promulgated by EPA under the CAA. Tr. 396.

5. The record shows that EPA, on August 27, 1998, expressed "concerns with the CCHD Section 105 Clean Air Act (CAA) program...," including six enumerated areas specifically among which it listed the ERC road paving offset program. CX 22, pg. 197; *See*, Tr. 386-387.

6. In the early '90's, CCHD supported two separate computer operations to service its needs. Tr. 225. It brought in-house and centralized most of its computer capabilities using a Windows-based system; however, APCD operated a separate computer service maintained by Hoch and his supervisor, Micheal Naylor, Director of the Air Pollution Control Division, to administer the ERC Program. Tr. 225-227. As a consequence, Hoch was given a dual-boot computer capable of accessing both the ERC databases and the central Windows-based District network. Tr. 355-356.

7. Sometime in 1996, Hoch expressed an interest in becoming Computer Manager for the APCD, ERC program. Dr. Ravenholt, however, was unwilling to create a new position which would entail a competitive recruitment. As a result, Hoch became frustrated with the program and decided voluntarily that he would "like to be out of it...," Tr. 227, and resigned from the ERC program in 1996.

8. In December, 1997, Hoch was interviewed by Keith Rogers, a reporter for the <u>Las Vegas Review-Journal</u>. Tr. 54, 154. Rogers appeared at APCD offices inquiring about the ERC Program. He was introduced to Hoch through Michael Naylor's office, Tr.153. The record does not show, however, whether Rogers initiated the request that he be provided access to Hoch or whether Naylor suggested to Rogers that he might want to interview Hoch. At the time, Hoch was working in the Compliance Section of APCD under the supervision of Mr. Sorden. Tr. 58. Before consenting to the interview, Hoch confirmed that Naylor agreed he should proceed to meet with Rogers, and he did. Tr. 154. The record shows that as early as July, 1996, APCD management, and Naylor in particular, were well aware of Hoch's dissatisfaction and many of his concerns about APCD's implementation of the ERC program. Tr. 121-124.

9. During his interview with the press, Hoch recalled Rogers asking him if

he believed the ERC Program was mismanaged and "off" by large sums of money, and if so, by how much. Tr.55. Hoch recalled telling Rogers that he did not know what the balance was, but acknowledged that it could be off by millions of dollars when both sides of the equation are considered. Id. Following the meeting, Naylor debriefed Hoch; and while Hoch sensed that Naylor was nervous about the interview, Naylor had no specific reaction Hoch could recall. Tr. 154.

10. At the time Hoch spoke with the Review-Journal in December of 1997, the Clark County ERC Program was included in the Nevada State Implementation Plan (SIP) which was submitted for consideration and approval by the EPA under the CAA. Tr. 104-105, 141-142; Tr. 384-385, 388-390.

11. Approximately two weeks after the interview with Hoch, on December 26,1997, an article by Keith Rogers appeared in the Review-Journal. The article noted that the offset credit program was out of balance, and quoted Hoch as describing the task of maintaining the account as a "tracking nightmare." CX 14, pgs. 65-67. The article further noted Hoch's concerns about lack of staffing and computer problems at APCD which failed to account for billings and assessments for 1994 and 1995, and again quoted Hoch: "The bottom line is, we don't know what the correct balance is. We could be talking some large numbers here. It could be potentially in the millions...." Id.

12. Dr. Ravenholt found the article uncomplimentary of the District's management in failing to bring the ERC "up to speed after having been involved for several years with it." Tr. 228. He was generally surprised at Hoch's suggestion quoted in the article that the ERC could be out of balance by millions of dollars, Tr. 258, and he was embarrassed by the reporter's impression of the condition of the Program. Tr. 265. Dr. Ravenholt testified "...it was not complimentary to the District's management...." Tr. 228. He was admittedly surprised by the magnitude of the potential ERC imbalance mentioned in the article, and noted "I served at the pleasure of the Board (of Health). If I couldn't take on remedying something that might be that far out of whack, you know, what am I doing in that role?" Tr. 258. Michael Sword was hired as an Assistant Director in APCD and was, in the summer of 1996, assigned the task, among others, of

computerizing the ERC Program. Tr. 227-228. Dr. Ravenholt testified, however, that "the program was still not running as it needed to" in December of 1997. Tr. 228.

13. The article prompted Dr. Ravenholt to refocus on the ERC problems

and the need for central management oversight of the program. He decided that the only solution was to transfer the ERC databases from the separate computer system operated by APCD to the central computer system with a standard database and documentation of all software innovations. Tr. 229-230. Because of his expertise with the ERC database, Hoch's assistance was sought during the period January through March,1998, in transferring the database to the central administration. Tr. 232.

14. Following publication of the article, Assistant Director Sword, Tr. 336, sent a memorandum to Hoch, dated December 29, 1997, asking Hoch to substantiate the quote in the Roger's article that "millions of dollars have been overlooked by management in the ERC Program." CX6, pg. 18. Hoch responded by memo dated December 31, 1997. He reiterated that he had stated, and was quoted in the article as stating, that the balance is indeterminate and "could be millions." Hoch then described, in detail, the methodologies of calculating emissions and offsets and shortcomings in the accounting system at the time which could account for millions of dollars in errors. CX9, pgs. 45-48.

15. On January 14, 1998, Naylor and Sword advised Hoch that they were planning to transfer him to the Title V, Federal Permit Section of APCD as Hoch had previously requested, but they first deemed it necessary to transfer him to the NSR (New Source Review) Section under the supervision of Elizabeth Gilmartin so that Hoch could "develop the necessary fundamental NSR permitting skills." RX 102; Tr. 172. The record shows that two new hires in the Title V were not first trained in the NSR Section. Tr. 400. Indeed, the record fails to show that any other Permit Specialist in the Title V Section ever went through NSR Section training. *See*, Tr. 240. Dr. Ravenholt , however, doubted Hoch would be happy in the Title V Section without preparatory training. Tr. 245.

16. About a year and a half prior to this assignment, Hoch and several other employees at APCD filed a grievance opposing a decision to hire Elizabeth Gilmartin as an APCD supervisor. Hoch and the others alleged that she was not qualified for the job. Tr. 170-172. The grievance was filed with Naylor, and Sword was aware of it at the time Hoch's transfer to Gilmartin was ordered. Tr. 59-60. Of the new employees assigned to Gilmartin's section, only Hoch had been a party to the grievance, Tr. 203-204; the others were new hires. Tr. 208. Hoch had been highly critical of Gilmartin, Tr. 110, and testified not only that he had not spoken to Gilmartin in over a year, Tr. 149-150, but that, as a result of the grievance, animosity existed between them.

17. With the transfer to Gilmartin, Hoch believed his job was in jeopardy and feared that Gilmartin would attempt to fire him. Tr. 59-60, 135-136. The record shows that two other employees who had participated in the grievance against Gilmartin were already assigned to NSR when she took over. Tr. 136; Tr. 172; Tr. 202. One dropped off the grievance before the assignment and the other had a strained relation with Gilmartin. Tr. 139-140, 148. When she learned that Hoch was assigned to her section, Gilmartin initially expressed concerns to her superiors about the reassignment. Tr. 196.

18. Gilmartin testified that during the time Hoch worked under her supervision, she was told by Sword that Dr. Kwalick, Assistant Chief Medical Officer, and Dr. Ravenholt's successor, "wanted him fired" if he did not perform, that Sword did not want Hoch "doing computer work," and that Sword himself was hired to "fire people. [E]specially the people on the grievance." Tr. 173-174, 176, 203, 205. Sword could not recall telling Gilmartin that Dr. Kwalick wanted Hoch fired, Tr. 353, and he denied claiming that he had been hired to fire people. He acknowledged, however, that he may have said that he was hired to "clean house." Tr. 353-54.

19. Gilmartin had never been advised about the terms under which she should fire any other subordinate. Tr. 205-206. Gilmartin testified that she was also asked to investigate Hoch by surreptitiously monitoring his work on the computer. Rowles and Karl Munninger, the District's Administrative Services Manager, authorized Jon Reed to provide her with Hoch's passwords and advised her that by using them she could sit in her office and view what Hoch was doing without his knowledge. Tr. 176-181, 207, 391-392; *See*, CX 13, pg. 64. She understood that the password allowed for "2 connections concurrent," CX 13, pg. 64; Tr. 393. She was not, however, told why they wished her to monitor Hoch. Tr. 181.

20. Munninger admitted that Gilmartin was provided with Hoch's password, Tr. 293, and that typically passwords were not given out, Tr. 318, but he denied that she was given the capability to remotely view Hoch's work. He also denied that Gilmartin was asked to spy on Hoch. Tr. 292, 331. He explained that "2 connections concurrent" meant that the Hoch account could be logged-on to two computers at the same time, and it was therefore possible to verify exactly what he could and could not access. Tr. 410. It would not, he claimed, permit her to monitor what Hoch was working on at the time or follow his keystrokes. Tr. 410. He testified that Gilmartin was given Hoch's passwords solely for the purpose of verifying exactly what Hoch could and could not access. Tr. 293, 331, 410. Gilmartin denied she was given the passwords to verify Hoch's access. She

testified she personally went to Hoch's computer to verify his access. Tr. 197.

21. Gilmartin testified that it was not normal procedure for supervisors at APCD to monitor the work of subordinates in the manner Munninger and Rowles suggested that she monitor Hoch. Tr. 392. Ordinarily, she did not have remote access to her subordinates last-name computer files from her terminal. *Id*; Tr. 394. If a staff member was absent and she needed access to something in their files, she would transmit a request through a supervisor who would forward it to the computer section. They, in turn, would retrieve the file and forward it to her. Tr. 394. She had never had the type of direct access to a worker's files that Rowles and Munninger provided to Hoch's files, Tr. 185, and she was aware of no other supervisor at her level who had such capability. Tr. 208. She had never been asked to monitor another employee. Tr. 206.

22. Munninger initially claimed that supervisors had access to all employee work files in their section, Tr. 412, and he denied that Gilmartin was given any greater access than other supervisors had to their employees' files. Tr. 414. He subsequently acknowledged, however, that supervisors did not routinely have direct access to the employee's last-name files unless requested by the employee. Tr. 413. The passwords he gave Gilmartin provided access to Hoch's last name file. Tr. 413-415.

23. Gilmartin did not use Hoch's passwords and did not monitor his work surreptitiously. Tr. 185. She rejected the suggestion that she was given Hoch's passwords merely to verify his complaints that he could not log on to the network. She testified specifically and credibly that she was asked to monitor his activities on the computer. Tr. 197.

24. Despite concerns expressed by both Hoch and Gilmartin, Gilmartin was neither hostile nor vengeful as Hoch's supervisor, and Hoch was able get along with her. She took no adverse action against him, gave him a decent performance evaluation, and initiated no disciplinary action against him. Tr. 109-110, 152. He incurred no demotion and no reduction in pay or benefits. Tr. 111. Hoch completed the NSR training in about six months, and received the transfer to the Title V Section he had requested. Tr. 110-111; 172-173.

25. During the investigation of Hoch's complaint by OSHA, Gilmartin was interviewed by an OSHA investigator. As a result of her testimony before OSHA in connection with Hoch's complaint, she was the target of harassment and retaliation which resulted in a complaint filed by Gilmartin against the District under that Clean Air Act. OSHA found in Gilmartin's favor, and the District did not request a hearing. Tr. 188-192; CX15, pgs.74-75, 78, 79.

26. The record shows that Hoch was having problems with his computer and filed a Data Processing Service Request (DPSR) on February 17, 1998. RX 179. DPSR's are processed through supervisory channels and eventually assigned to a technician to perform the work. Tr. 113-114. Hoch's dual boot machine was unique in APCD, and had the potential for more technical difficulties than other machines. Tr. 322-23

27. In late 1997 and early 1998, the District experienced a series of glitches, bugs, viruses, malfunctions, and, in some instances, acts of actual sabotage of its computer systems and software. Tr. 232, 252; Tr. 272-277; Tr. 354-355; Tr. 371; Rx 111; Rx 172; Rx 177; Rx 178. In a January 31, 1998, memorandum, Munninger, for example, explained that security of the APC database was tightened to restrict APC staff access to the extent "defined by Mike Sword." Tr. 277; Rx 178. District management did not, however, accuse or target Hoch as someone who harmed the data, Tr. 234; Tr. 297, but allegedly, because he had a DPSR pending on March 4, 1998, his computer was the first, and in fact the only computer, to have Access 7 deleted. Tr. 250, 255.

28. On March 3, 1998, a technician, Paul Orillion, was creating and revising a program designed to facilitate the transfer of ERC billing data to the central computer. When he returned from a lunch break, he found that he was locked out of his program. Tr. 232-233; 278. Orillion reported the problem to Munninger, his supervisor, and they determined that owner of the database "container" had been changed from Orillion to "unknown," thus locking out Orillion. Tr. 278-279, 282, 330. Munninger determined, in consultation with Microsoft Access technical support, that a change of ownership of the "container"could only be accomplished by using a separate security file and transferring Orillion's database container to a new container by a fairly sophisticated computer end user. Tr. 280, 304, 329-330.

29. Munninger met with Sword on March 4 to discuss the Orillion lock out. Munninger complained that such interference was jeopardizing his progress in transferring the ERC database to the central Computer. He testified, and Sword

confirmed, that he and Sword came up with a strategy to limit APCD staff computer access to folders and files they specifically needed to perform their job functions, and they decided to remove Access 7, a software database manager which included the ERC database, Tr. 72, from all APCD staff members whose job did not require access to it. Tr. 282; 358. Munninger testified further that he lacked the resources to reprogram all staff computers at the same time, and accordingly, he and Sword agreed that Sword would list individuals who did not need Access 7 data, and thereafter, Access 7 would be deleted over time beginning with staff members who had pending DPSR's. Tr. 283-284. Sword testified that he never gave Munninger the list they had discussed. Tr. 378.

30. Although Hoch was not deemed a particular security risk, Tr. 234; Tr. 297, his computer was the first one targeted for removal of Access 7. Munninger and Sword disagree whether this was intentional. Munninger testified:

> Q. Now, did you have a plan as to how were you going to accomplish this removal of Access 7 in terms of timing?
>
> A. In reviewing the pending data processing requests, we noted that we already had a repair order request in from David Hoch." Tr. 283.

Later, Munninger again addressed the selection of Hoch's computer:

> Q. And, did he (Sword) mention any particular employees that he wanted you to start with?
>
> A. No, other than the fact that David Hoch had a pending DPSR in the hopper. We decided to start out with that and then secondarily with other Specialists.
>
> Q. So, did he at that point tell you to go change Mr. Hoch's computer and start with his?
>
> A Right, to go ahead and focus on the boot-up problem

with David Hoch's computer." Tr. 306.

Munninger testified that he and Sword specifically discussed and agreed that Hoch's computer should be first to undergo reprogramming. Tr. 308.

31. In contradiction to Munninger, Sword testified:

> Q. Now, did you ever ask Mr. Munninger to somehow target David Hoch for this?
>
> A. No.
>
> Q. Did you suggest or direct Mr. Munninger to start with David Hoch?
>
> A. No. Not that I recall.
>
> Q. I mean were you aware of the big stack of DPSR's that were somewhere in data processing?
>
> ` A. I'd seen them. There was a couple-
>
> Q. Right. But, I mean were you aware of who might be in there or on top or on the bottom?
>
> A. Well, yes and no. I mean , most of the data processing requests require my signature. I mean, that's the routine is for me to sign those things to authorize the work.
>
> Q. But, I mean-
>
> A. So I had- I had probably seen- I mean, I knew I had signed a lot of them. There was no two ways about that.
>
> Q. You mean, as you sit here today, can you say that on March 4th, talking to Mr. Munninger,

> you knew there was one in there from David and that's the one you wanted targeted first?
>
> A. No, actually I have looked at that and it does not have my signature on it at all. I was totally unaware that one was in there.
>
> Q. So, how did you and Mr. Munninger decide you were going to get to all of these computers to do this Access 7?
>
> A. Well, there weren't very many people to do very many tasks. So, we decided that as- as things came up on routine data processing requests, that we would take care of those things in that order and in that fashion. Tr. 359-360. *See also*, Tr. 377-379.

32. Sword thus contradicted Munninger and denied that he was aware of Hoch's pending DPSR, and he denied any recollection of directing Munninger to target Hoch's computer, Tr. 377-378. Further, contradicting Munninger, he testified that he did not have the work orders when he discussed the matter with Munninger, and, therefore, could not have pulled out Hoch's DPSR. Tr. 379.

33. From day to day, Munninger's shop may have a stack of 50 to 75 pending service requests submitted by staff either by telephone or written DPSR's. Tr. 334-335. Within approximately one hour after Munninger's meeting with Sword, Administrative Services removed Hoch's computer from his office. Tr. 307-309.

34. On March 4, 1998, a technician, Rocky Gerzel, from the administrative section of the District, accompanied by Sword, entered Hoch's office and removed his computer. Tr. 62. Gerzel acted upon the orders of Munninger, his supervisor. Tr. 268. When Gerzel returned the computer later that day, the software program, Access 7, had been removed. Tr. 60. Access 7 was a database manager which included the ERC database. Tr. 72.

35. The record shows that the removal of Access 7 started and ended with Hoch. Tr. 286. In addition, Hoch's network access was circumscribed to his own personal directory and to the NSR tracking files. Tr. 287. Munninger testified

that it was never his intent or Sword's intent to remove from Hoch's computer access to information he needed to do his job. Tr. 291, *See*, Rx 183. The part of the ERC database Hoch could not access was the registry roll of credits showing what companies needed and what they accomplished or failed to accomplish and the billing information. Tr. 72.

36. By memo dated March 4, 1998, Hoch advised his supervisor, Gilmartin, of the new limitations which had been placed upon his computer access and suggested that the software had been removed in retaliation for his statements to the Review-Journal in December of 1997. CX 9, pg. 49.

37. On March 5, Hoch discovered that he was unable to access the network server to retrieve information from the "general folder," the DAVIDH folder, containing the first names of APCD employees, and available to all of Hoch's co-workers. *Compare*, CX 4 pg. 13 (Copy of Hoch's PC screen) *with* CX 4 pg. 14 (Copy of PC screen of Co-worker). Tr. 74, 76. He was virtually completely cut off from the network. Tr. 166-118, 137. Databases available to other Permit Specialist II's, and files, reference materials, and documents Hoch had been working on were no longer accessible to him. Tr. 73. RX 114, pg. 177. Sword testified that to the best of his knowledge Hoch was never cut off from the network, and his "privileges had never been changed." Tr. 381. Sword claimed he "never understood why those problems existed or persisted." Tr. 377. Munninger, however, acknowledged that Hoch's "network access was circumscribed to his own personal directory and to NSR tracking files." Tr. 287. Munninger claimed that this was done based upon "A list of files ... that we obtained from APCD management." Tr. 287. Sword acknowledged that he discussed giving Munninger a list of files that he wanted removed from various computers, but he denied that he gave Munninger such a list at their March 4 meeting, and he could not recall ever giving such a list. Tr. 378.

38. By memo dated March 5, Hoch advised Gilmartin that he believed, in further retaliation for his disclosures to the Review-Journal, his access to the network server had been restricted. He also informed her that earlier that day he met with Sword , who told him that Access 7 was a faulty piece of software and would be deleted from all personal computers at APCD, and that Hoch was being "paranoid" about what had been done to his computer. Tr. 78; 363-64; CX 9 pg. 50.

39. The record reflects that Access 7 was not completely deleted from the

computers of any of Hoch's co-workers, Tr. 78-79, 250, 255, 313. In a strictly limited fashion, some Access 7 security files were removed from the computers of some staff members, Tr. 300; Tr. 363.

Dr. Ravenholt intervened because of "volatility... within the group," Tr. 250, to "calm down the situation," and he reversed the decision to delete Access 7. He had never specifically approved Sword's plan, Tr. 252-255, but generally wanted his staff to remedy the computer problems in APCD. Having received information from Gilmartin on March 6 that Hoch was "very disturbed," Tr. 236, about what had been done to his computer, Dr. Ravenholt met with Hoch that day to diffuse the situation and reassure him that his job was secure. Tr. 236. Dr. Ravenholt confirmed that, although he did not know precisely which programs Hoch needed to perform his duties in the NSR Section, Hoch asserted a need for Access 7, supported perhaps by Gilmartin, and he ordered the program restored. Tr. 250. Subsequently, on a date not disclosed in this record, Dr. Ravenholt directed that Access 7 be restored to Hoch's computer. Tr. 250. As Sword would later testify, "I got overruled by Dr. Ravenholt who decided to give it back to him. He wouldn't remove it from everyone's computer. " Tr. 362-63, Tr. 313. The record further shows that Munninger and Sword acted within approximately one hour of the Orillion incident to remove Hoch's computer. The record fails to show, however, that they acted to remove Access 7 from any other employee at any time prior to Dr. Ravenholt's intervention.

40. On March 10, 1998, Hoch was called to a meeting attended by Dr. Ravenholt; Dr. Kwalick; David Rowles, Director, Administrative Services; Naylor; Sword; Gilmartin; and Hoch. Tr. 90. Hoch understood the meeting was convened to offer him an apology for the limitations placed on his computer, and his input was sought in troubleshooting the Orillion lock-out problem. Tr. 401-404.

41. By memo dated March 18, 1998, Hoch recounted what he regarded as the elements of an apology, and basically expressed his dissatisfaction that those who attended the meeting failed to convey the appropriate contrition. He testified, however, that the meeting was generally friendly and not hostile. Tr. 145. Although Hoch complained that he had not received an explanation for the removal of Access 7 from his PC, CX 9, pgs. 55-56, as a result of this meeting, Access 7 was essentially restored to his computer. Tr. 77, 80, 91.

42. The Clark County Board of Health convened a special meeting on March 12, 1998, to consider, among other issues, the ERC Program. Tr. 97-98. Dr.

Ravenholt and other officials of APCD participated at the meeting; and in the context of discussing the ERC Program, David Rowles specifically commended Hoch, and others, who helped develop the ERC database. Rx 120.

43. Hoch requested, on March 12, 1998, and Dr. Ravenholt approved, a leave of absence from April 1 through April 30, 1998. Tr. 112,118. Hoch testified that he requested leave because he “felt pretty bad emotionally...,” Tr. 130, but the leave was not urgent, and he was able to come to work and perform his job. Tr. 130.

44. Dr. Ravenholt twice met with Hoch to afford Hoch an opportunity to explain his concerns about his computer access. Tr. 132, 134. Hoch believed Dr. Ravenholt was attempting to find out the facts. Tr. 138.

45. Dr. Ravenholt’s memo approving the leave noted that while Hoch may have felt that his work environment was hostile, Dr. Ravenholt sought to reassure Hoch that he should not misconstrue good faith efforts to improve APDC programs as directed against him personally. RX 123. In approving the leave, Dr. Ravenholt advised Hoch that he would be required to use his annual leave first, then he would be placed on leave without pay. Hoch’s benefits were also adjusted to reflect a month of leave without pay, consistent with standard procedures. Tr. 131-132. The same day, Hoch received a memorandum from Sword, who sought to assure him that his service to the District was valued and appreciated. Tr. 376; Rx 116, pg. 179.

46. Before commencing his leave, Hoch, on March 20, 1998, filed a DPSR requesting certain network privileges, and Sword approved his request. RX 179, Tr. 117.

47. On May 1, 1998, Hoch, upon returning from the leave of absence, discovered that his network privileges had not been restored. In a memo to Gilmartin, Hoch advised her that he still did not have access to computer files he needed to perform his job, and Gilmartin confirmed by observation of Hoch’s computer screen that files available under her log-in name were not available under his log-in name. CX 9, pg. 57, Tr. 92-93; Tr. 197, 201.

48. Sword testified that he wanted Hoch to have access to the directories he needed to do his job, and could not understand why he was experiencing difficulties: “I just wanted to get him up and running and get it behind us.” Tr. 362. He had twice checked with the Administrative Section to confirm that Hoch’s

problems were addressed, Tr. 364, and spoke with Munninger about fixing Hoch's problems. Tr. 380.

49. Following Hoch's complaints to his supervisor and Sword, Tr. 81, his network privileges were eventually restored on or about May 8, 1998. Tr. 80; Tr. 366; Rx 204. Sword testified that he was unaware that Hoch had any restrictions on his access to the network, Tr. 381-382, and no one ever determined why Hoch was cut off from the network to the extent that he could not perform his job. Tr. 382. Yet, Munninger acknowledged that he circumscribed Hoch's computer network access privileges based on an alleged list he received from "APCD management." Tr. 287. The record shows Sword was supposed to prepare the list, but he could not recall ever actually drafting it or giving a list to Munninger. *Compare,* Tr. 287, 308, *with* Tr. 378. Munninger testified that he and Sword "agreed" to start with Hoch "until Sword could get a listing of files the other specialists needed access to in order to perform their job function...." Tr. 308. Sword could not recall giving Munninger any list during their meeting, Tr. 378, and specifically denied suggesting to Munninger that he start by deleting files from Hoch's computer. Tr. 377-379.

50. Hoch believes that he no longer has a career future with APCD. His confidence in APCD management has eroded, and he senses his colleagues are skeptical of him. He feels frustrated and believes other employers would be reluctant to hire him because he is a whistleblower, and he senses his co-workers are skeptical of him. He and his wife "agonize over these things quite often." Tr. 99-100. He seeks redress from the CCHD in the form of damages and computer training for approximately two years, leading to a BS degree in computer science. Tr. 101-102.

Discussion

I.
Hoch's Disclosures

The activity for which Hoch claims Clean Air Act (CAA) protection arose out of a December, 1997, interview he granted to reporter Keith Rogers of the Las Vegas Review-Journal, a local morning newspaper with daily circulation of about 160,000 serving southern Nevada. Apparently, Rogers was investigating the operation of the ERC Program at the offices of the Air Pollution Control Division

(APCD) of the Clark County Health District (CCHD). The ERC Program was devised, in theory, to reduce the level of airborne inhalants in the Las Vegas Valley by requiring businesses to earn credits or pay fees for producing pollutants, thereby generating funds for paving to reduce dust emissions from dirt roads. According to Dr. Otto Ravenholt, Clark County's former Chief Health Officer, APCD cooperated fully with Rogers' inquiry, providing him with documents to review and staff personnel to interview.

Hoch, it seems, became entangled in the web of Rogers' research. Rogers apparently sought an interview with Hoch as someone knowledgeable in the workings of the ERC program who could assist him in preparing his article. Before agreeing to speak with Rogers, Hoch sought and received the approval of APCD management. Obligingly, Michael Naylor, Director of APCD, specifically authorized Hoch to meet with Rogers.

Hoch spoke with Rogers "on the record," candidly describing, in detail, the shortcomings in the ERC Program and volunteering critical opinions about Program management to no real surprise among his supervisors. While APCD management questioned Hoch's estimate that the ERC Program could be millions of dollars out of balance, his criticism of the ERC Program was no secret around APCD. Earlier in his career, he shouldered responsibility for maintaining the ERC database, and at one time unsuccessfully urged APCD to create a new position titled ERC Data Manager, for which he considered himself uniquely well-suited. Some suggest that Hoch's antipathy toward the ERC program emanates from his disappointment over the rejection by his superiors of his idea to create the Data Manager job; however, no one disputes Hoch's in-depth appreciation of the flaws which existed in the ERC Program. He had, prior to the Rogers interview, voiced his concerns, in house, to his APCD supervisors, and apparently felt constrained by few inhibitions in providing a rich bounty of ERC Program defects to Rogers.

On December 26, 1997, a by-line article, authored by Keith Rogers, appeared in the Review-Journal. It was highly critical of APCD's ERC Program administration and drew, with attribution, upon the Hoch interview material. Although Rogers relied upon a number of different sources, the article, citing Hoch, described ERC methods of maintaining pollution charges and offsets as a "tracking nightmare," disclosed APCD delinquencies in its billings, revealed the program could be out of balance by "millions" of dollars, and that it was beset by computer problems and under-staffing. Rogers went on to report Hoch's observation that "some consensus" existed in respect to fixing the Program, but "nothing ever happens." Upon reading the article, Dr. Ravenholt found it uncomplimentary to APCD's Management, and Hoch alleges, as a result of his forthcoming disclosure to the media, he was subjected to discriminatory, retaliatory adverse job actions.

II.
Burden of Proof

The CAA, as amended, provides, in part, as follows:

> No employer may discharge or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee...
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such proceeding or in any manner in such a proceeding or in any other action to carry out the purposes of this chapter. 42 U.S.C. § 7622 (a)(1)-(3).

The burden of proof under this statutory scheme rests with the Employee to establish that (1) the party charged with discrimination is an employer subject to the Act, (2) the employee engaged in protected activity, (3) the employer took adverse action against the employee, and (4) the protected conduct was the likely reason for the adverse action. *See,* Deford v. Sec. of Labor, 700 F.2d 281, 286(6th Cir. 1983); Mackowiak v. University Nuclear Systems, Inc. 735 F.2d 1159, 1162 (9th Cir. 1984); Sherrod v. AAA Tire and Wheel Co., 85 CAA 3 (Nov. 23, 1987). CCHD does not dispute its status as a covered employer under the Act; however, it denies Hoch engaged in any protected activity or was the target of any discriminatory action by ACPD management. Hoch's conversations with the Review-Journal's reporter, it contends, played no role in any decision it made affecting his work environment, and it rejects his contention that he was a victim of any retaliation.

III.
Protected Activity

Now, the threshold question presented in this adjudication is whether Hoch's interview and disclosures to the Review-Journal's reporter constituted protected activity under the Clean Air Act. CCHD advances a multi-pronged attack on the notion that Hoch engaged in any covered activity. In its opinion, neither the interview nor Hoch's disclosures warrant protection since the ERC Program, at the time the interview was conducted, was not part of the Clean Air Act or its implementing regulations. Although it was eventually approved by the EPA effective June 10, 1999, the ERC Program was promulgated by the Clark County Health District as Local Rule 12 and, as such, at times relevant to this proceeding, was unenforceable by the Federal EPA. Consequently, in CCHD's considered judgment, none of Hoch's disclosures involved an actual violation of the Act, and Hoch never demonstrated a reasonable belief any violation occurred.

In a related discussion in its post-hearing brief which addresses an issue raised at trial, the District considers the implications which necessarily flow as a consequence of the ERC Program's inclusion as part of a State Implementation Plan (SIP). Incorporated into Nevada's SIP, CCHD's ERA Program was submitted to the Federal EPA for its consideration and approval under the Clean Air Act. In this context, CCHD urges rejection of Hoch's criticisms as protected activity because he disclosed them as a source to a reporter rather than as a participant in the Notice and Comment period provided by EPA in connection with its consideration of the SIP. CCHD finds no congressional intent to extend whistleblower protection under such circumstances. Finally, CCHD rejects the essence of Hoch's disclosure as protected subject matter because it involved allegations of what CCHD describes as complaints about general mismanagement in the ERC Program, not specific complaints about health and safety. For the reasons set forth below, I find each of the District's contentions devoid of persuasive merit.

A.
When A Local Rule Triggers CAA Coverage

CCHD emphasizes the status of its ERC program as a local rule at the time the alleged protected activity occurred, and contends that complaints about mismanagement of a local rule would not rise to the level of a violation of the CAA or its implementing regulations. Consequently, jurisdiction to adjudicate Hoch's complaint under the CAA is, in its view, lacking. CCHD misperceives the issue.

Whether a local rule conceived as a measure to facilitate environmental improvement may be administered in a way which does not simply fail to achieve its objective, but actually violates or fosters violations of the CAA, is not really the issue presented by the facts developed in the record of this proceeding. The record shows that the District's ERC Program was not simply a matter of local interest. Indeed, the ERC Program was proffered to EPA as a plan to address the Las Vegas Valley region designation as a PM-10 (particulate matter) nonattainment area under the CAA. 42 U.S.C. §7407. Both the nonattainment designation and Nevada's State Implementation Plan (SIP) to address it are broadly governed by provisions of the CAA as administered by EPA. 42 U.S.C. §§ 7407, 7501, and 7504.

Prior to its approval by EPA, the ERC Program may have been, as CCHD contends, enforceable only by local authority, but obviously the program's strengths and weaknesses were not merely a matter of local concern. The District's ERC program was submitted by state officials, who considered it a viable plan, to federal authorities, who evaluated it under jurisdiction conferred upon them by the CAA. The ERC was pending before the EPA when Rogers interviewed Hoch.

Nevertheless, construing the CAA in the narrowest possible sense, CCHD argues that Hoch is entitled to no protection because he disclosed no violation of the CAA, nor did he reasonably perceive a violation of the statute. In its view, <u>Abu-Hjeli</u> , 89 WPC 1, and <u>Minard</u> v. <u>Nerco Delamar Co.</u>, 92 SWD 1 (Sec., 1994), and <u>Crosby</u> v. <u>Hughes Aircraft Co.</u>, 85 TSC 2(Sec. 1993), support the view that CAA protection covers disclosures involving CAA violations, not disclosures about purely local environmental codes.

The protections afforded by the CAA, however, are not limited to disclosures of violations or suspected violations, as CCHD maintains. Participation in CAA enforcement proceedings is only one aspect of CAA whistleblower coverage. The CAA also provides a shield against discriminatory retaliation for those who assist or are about to assist in a proceeding " for the administration... of any requirement imposed under this Act or under any applicable implementation plan," or in "any other action to carry out the purposes of this Act." *See*, Section 7622(a)(1), (3). As the foregoing discussion of the statutory scheme Congress devised under the CAA amply demonstrates, the entire process of designating nonattainment areas, drafting and submitting SIPs, and consideration and action by EPA broadly encompasses congressionally delegated responsibilities generally considered elements associated with an agency's "administration" of its congressional mandate. In this context, EPA's inability to enforce the ERC Program prior to its approval of the SIP is irrelevant, because the ERC Program was part of the SIP for which Nevada was seeking EPA approval. CCHD's suggestion that its ERC Program was a purely local initiative which afforded Hoch
no protection simply ignores EPA's responsibility to administer the Act by

evaluating the Program's merits in connection with its consideration of Nevada's SIP. It is thus unnecessary to decide whether disclosures relating to a purely local environmental initiative could ever trigger CAA protections; whatever status a purely local program might enjoy, CCHD's ERC Program migrated into the ambit of CAA coverage when the State incorporated it into its SIP and submitted it to EPA for approval.

B.
Blowing the Whistle on Mismanagement

CCHD next argues that a careful evaluation of Hoch's disclosures reveals, in essence, a concern not about violations of the CAA, but circumstances which amount merely to instances of mismanagement. Hoch told Rogers about billing delinquencies, shortcomings in financial record keeping, computer, and staffing problems. CCHD believes applicable case law rejects such complaints about mismanagement as a basis for affording a worker the benefits of whistleblower protection. Aside from the fact that Hoch's comments were not limited to instances of program mismanagement, but further questioned the effectiveness of the ERC concept which EPA was then evaluating, the case law relied upon by CCHD is otherwise distinguishable.

The deficiency in CCHD's analysis of the case law stems from its failure to differentiate the various contexts in which disclosure of mismanagement may occur. A worker who, for example, disclosed that a defense contractor was "mischarging" its proprietary projects to its defense contract was not entitled to environmental whistleblower protection, and in fact, he conceded the point at his hearing. Such conduct had no bearing on any environmental issue. Crosby, *supra* at pg. 2. Similarly, CCHD relies upon Deveraux v. Wyoming Assoc. of Rural Water, 93 ERA 18 (Sec. 1993), as authority for the proposition that complaints about inaccurate records, mismanagement, and waste are not protected under the federal acts. Although the Secretary in Deveraux determined that a timely complaint had not been filed, thus rendering further discussion of the case largely moot, for the sake of analysis, I consider it.

A review of the trial judge's findings in Deveraux reveals that the worker's complaints related to improper expense vouchers submitted by program managers and were not concerned with "safety or pollution." Deveraux , *supra*, ALJ D&O at

2-3. Unlike the EPA's consideration of the District's ERC Program here, the District propounds no theory explaining what possible interest under the Energy Reorganization Act the Nuclear Regulatory Commission (NRC) had in the expense vouchers at issue in Deveraux. In contrast, mismanagement in the operation of a nuclear power plant or the handling of nuclear material would no doubt present another matter. Such mismanagement might indeed involve issues which the NRC could conclude were pertinent to its administration of its congressional mandate. As might be expected, complaints about mismanagement of this type constitute a fairly basic and rather important form of protected activity.

Providing context to the line of cases discussed above, Passaic Valley Sewage Commissioners v. Department of Labor, 992 F.2d 474 (3rd Cir. 1993), affords a different perspective. In this case, the Court extended protection to an employee who complained about the *ad valorem* user charge system adopted by Passaic Valley under the Clean Water Act. The employee complained that the system was inordinately expensive, inefficient, unreliable, and although approved by EPA, was not operating fairly to allocate user fees. In many respects, the complaints of mismanagement and ineffectiveness he voiced to his superiors were quite similar to the type of complaints expressed by Hoch to reporter Rogers. Passaic Valley involved criticism of the administration of the Clean Water Act directly through the implementation of the *ad valorem* user charge, while this matter involves criticism of a program pending EPA's approval pursuant to its authority to administer the CAA. The Secretary determined that the Passaic Valley employee engaged in protected activity and the Court agreed, and there is no reason to anticipate that Hoch's complaints of mismanagement and ineffectiveness in a program pending EPA approval should be treated any differently.

Nor do cases such as Aurich v. Consolidated Edison of New York, Inc., 86 CAA 2 Sec. 1987), or Kesterson v. Y-12 Nuclear Weapons Plant, 95 CAA 12 (ARB 1997), provide any useful guidance here. Aurich simply involved a determination by the Secretary that occupational hazards related to indoor air quality are governed by OSHA regulations, not the CAA, while Kesterson, in pertinent part cited by CCHD, observed that objections to tampering with evidence in a criminal proceeding or fabricating reasons to fire an employee may be afforded protection under other statutes, but not the environmental whistleblower laws. Unlike Aurich and Kesterson which invoked non-environmental policy considerations, CCHD essentially and convincingly conceded the applicability of the CAA when it submitted its ERC Program for inclusion in the SIP for the purpose of addressing its air quality problem under the CAA.

For all of the foregoing reasons, I conclude that disclosure of mismanagement which may adversely affect the administration of an environmental act, such as those conveyed by Hoch to Rogers, properly constitutes protected activity warranting protection under the CAA.

C.
Blowing the Whistle to the Media

The Secretary has determined that reports to the media may be protected activity under the environmental acts, and CCHD does not argue to the contrary. It does contend, however, that Hoch's comments to the media are not protected in this particular instance, because they involved claims of mismanagement and negligence, not outright fraud, and, in any event, EPA's procedures contemplate a Notice and Comment period for proposed SIPs. Since Hoch could have availed himself of the opportunity to submit his views directly to the agency and did not do so, CCHD would deprive him of CAA protection.

Initially, the notion that an employee must pursue the formal channels of communication provided by an agency for the receipt of information about violations of law or comments about pending rules is not well-founded. In Passaic Valley, *supra*, the Court explicitly interpreted the statutory term "proceeding" as reasonably encompassing "a range of complaint activity of varying degrees of formal legal status." Passaic Valley, at 478. Indeed, purely internal complaints which may never come to the attention of a federal regulator are generally regarded as protected activity. *See,* Passaic Valley, *supra*; Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); Pogue v. U.S. Departemnt of Labor, 940 F.2d 1287 (9th Cir. 1991); Kansas Gas & Electric Co. v. Brock, 780 F.2d 11505 (10th Cir. 1985), *cert. denied* , 493 U.S. 1011 (1986). Surely, disclosures which prompt remediation are consistent with the fundamental policy considerations underlying employee protection provisions of the environmental acts, and extending the term "proceeding" to cover them comports with the purpose and legislative history of the act. Passaic Valley, *supra*, at 478-479.

Thus adopting the broad interpretation of "proceeding" applied by the Courts, the Secretary of Labor has construed the language of the environmental acts as protecting an employee who reveals or is about to reveal environmental concerns not only to his employer or to the appropriate agency, but also to the press. Dias-

Robainas v. Florida Power & Light, 92 ERA 10 (Sec. 1996); Floyd v. Arizona Public Service Co., 90 ERA 39 (Sec. 1994); Pooler v. Snohomish County Airport, 87 TSC 1 (1994); *See,eg.*, Donovan v. R.D. Anderson Construction Co., 552 F. Supp. 249, 251-52 (D. Kansas, 1982).[1] As this record vividly demonstrates, the goal of achieving voluntary remediation may, indeed, be facilitated more readily through a press disclosure than an employee's internal complaint.

As CCHD itself emphasizes, Hoch's complaints about APCD's management of the ERC Program were voiced internally to his supervisors long before he mentioned them to the reporter. *See*, CCHD post-hearing brief at 4; *See also*, Finding 8, *supra*. Notwithstanding his internal complaints, however, the problems persisted. Thus, Rogers reported Hoch's observation that a consensus existed within CCHD regarding the need for an improved accounting system, "but nothing ever happens." After the article appeared in the Review-Journal, however, Dr. Ravenholt agreed the program was not operating as it should, and he acknowledged that the article prompted him to refocus on ERC problems, including the need for central management oversight of the Program. As a result, he initiated steps to accomplish voluntary remediation and directed his staff not only to transfer the ERC database to APCD's central computer, but begin standardizing the database and

documenting the software. Obviously, the Review-Journal article increased ERC Program illumination on management's radar screen and drew a level of operational attention to solving ERC Program flaws which Hoch's internal complaints simply never could command.

For all of the foregoing reasons, and consistent with applicable precedents, I, therefore, conclude that Hoch's disclosures to the press revealing mismanagement in the operation of CCHD's ERC Program constituted protected activity within the meaning of Section 7622 of the Clean Air Act. It remains his burden, however, to establish by a preponderance of the evidence that CCHD discriminated against him "on the basis of protected activity." Pittman v.Goggin Truck Line, Inc. , 96 STA 25 (ARB, 1997); Agbe v. Texas Southern Univ., 1997 ERA 13 (ARB 1999); Paynes v. Gulf States Utilities Co., 93 ERA 47 (ARB, 1999); Carroll v. Bechtel Power Corp., 91 ERA 46 (Sec. 1995) *aff'd*. Carroll v. Dept of Labor, 78 F. 3d 352 (8th Cir. 1996).

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[1] In Donovan, the court approached the question a bit differently, finding coverage in the context of a complaint to the media about an employee's OSHA concern, not because it viewed the communication itself as a "proceeding" but rather because the communication could result in the institution of an OSHA proceeding.

IV.
DISCRIMINATORY ADVERSE ACTION
A.
Retaliation

Less than three weeks after the article appeared in the Review-Journal, Hoch was assigned by Naylor and Micheal Sword, Assistant Director, APCD, to work in the New Source Review (NSR) Section of APCD under the supervision of Elizabeth Gilmartin, thus placing him under the authority of a boss whose appointment he had formally opposed, in writing, only eighteen months before. Hoch and several others had filed a formal grievance which questioned Gilmartin's qualifications, and it was known around APCD that Gilmartin's relations with another subordinate in her section who signed the grievance were somewhat "strained." Hoch and Gilmartin had essentially avoided each other, but the assignment, both knew, would force a change in the status quo, and Hoch perceived retaliatory implications in this personnel move. Sword and Naylor were affording him an opportunity to experience firsthand the "qualifications" of a supervisor he had essentially labeled incompetent. *See*, Finding 16, *supra*. The assignment to Gilmartin, Hoch sensed, placed his job in jeopardy.

His concerns intensified approximately six weeks later, when, following what he thought were routine repairs on his computer in response to a service request he had submitted to CCHD's Administrative Services Section, managed by Karl Munninger, he discovered he could no longer use computer programs and files available to his co-workers or gain access to office computer network services he needed to perform his work. He believed his computer access was circumscribed in retaliation for his interview with Rogers, and the record supports his contention.

B.
Circumstantial Evidence
1.
Temporal Proximity

Initially, the record shows a temporal nexus of approximately three weeks between the publication of Rogers' article and Hoch's transfer to Gilmartin, and less than three months later, Sword and Munninger imposed severe limitations on Hoch's computer access to CCHD programs and resources.

The proximity in time between protected activity which may displease an employer and potentially adverse job actions is sufficient to infer a causative link between the two occurrences. *See generally*, LaTorre v. Coriell Institute For Medical Research, 97 ERA 46 (ALJ, Dec. 3, 1997), *aff'd. and remanded on other grounds*, 98 ARB 40 (February 26, 1999); Mandreger v. The Detroit Edison Co., 88 ERA 17 (Sec., March 30, 1994) (Six month interval between whistleblower activity and adverse job transfer); White v. The Osage Tribal Council, 95 SDW 1 (ARB Aug. 8, 1997) (Proximity in time ... is solid evidence of causation). While a temporal nexus may not alone be sufficient in all cases to establish a causal link between two actions, Jackson v.Ketchikan Pulp Co. , 93 WPC 7 and 8 (Dec. of Sec. March 4, 1996), Bartlik v. U.S Dept. of Labor, 1996 U.S. App. LEXIS 394, 1996 Fed. App. 0012p (6th Cir. 1996), it is a factor which may be considered along with other circumstantial evidence which either strengthens or severs the connection. Coriell Institute, *supra*; Jackson, *supra*; Bartlik, *supra*; Zinn v. Univ. of Missouri, 93 ERA 34 (Sec., Jan. 18, 1996). Thus, before turning to CCHD's explanation for Hoch's reassignment and the subsequent limitations which it programmed into his computer, it must be observed that the temporal connection between the assignment of a protected worker to a hostile supervisor or the discriminatory denial of access to needed computer resources available to a protected worker's colleagues constitutes circumstantial evidence of unlawful retaliation under the act.

2.
Other Motivational Factors

Now circumstantial evidence can, and often does, track in conflicting directions, frequently alternating between factors which tend to substantiate or mitigate a retaliatory intent. Citing Hasan v. Energy Resource Systems, Inc., 89 ERA 36 (ALJ, 1989) as an example, CCHD emphasizes its own cooperation with Rogers to the point of approving his interview with Hoch notwithstanding management's awareness of Hoch's hostility to its program. In Hasan, the supervisor himself selected the complainant to meet with an NRC auditor because he considered him the most knowledgeable person to address the pipe support flexibility issue the NRC was investigating. The Hasan supervisor, like Naylor here, was aware that the employee did not share his opinions about how to deal with the problem under review. Thus, the Hasan decision concluded, on reasoning affirmed on appeal, (*See*, 89 ERA 36 (ALJ, 1989), *aff'd.*, (Sec., 1992), *aff'd.*, Hasan v. Reich, 1 F.3d 1236 (5^{th} Cir. 1993)), that Hasan's supervisor would not likely have selected

Hasan to meet privately with the auditor if he intended to suppress his views.

Obviously, the facts here are similar to Hasan, but nevertheless distinguishable. A key distinction in this record is the absence of affirmative evidence demonstrating that Naylor, like Hasan's supervisor, actually selected Hoch to meet with Rogers, thereby volunteering his controversial opinions for likely publication in an environment which could prove troublesome for the employer.[2] If Rogers asked to interview Hoch, the initiative rested with the reporter rather than the supervisor and the implications depart from the Hasan rational. For Naylor then to disapprove an interview requested by the reporter would have required him essentially to countermand Dr. Ravenholt's assurance to Rogers of the agency's full cooperation. Naylor's approval under such circumstances would not be indicative of the same measure of openness exhibited by the supervisor in Hasan, but rather a decision essentially compelled by events. Nor would the cooperation of Dr. Ravenholt or Naylor, assuming he volunteered Hoch, cast a shield of immunity over any retaliatory retribution directed at Hoch by other members of CCHD's management team.

CCHD further contends that no one was surprised by the views expressed by Hoch, nor did they downplay, conceal, or reject his opinions. To the contrary, his views and comments were solicited for inclusion in a corrective plan of action. Cases such as Hasan, *supra*, Abu-Hjeli, 89 WPC 1, Smith v. Esicorp, 93 ERA 16 (Sec. 1996), and Miller v.Tennessee Valley Authority , 97 ERA 2 (ARB, 1998), suggest that these factors belie a finding of retaliatory intent. Indeed, such considerations may militate against finding of intent in some cases, but not here.

Hoch's supervisors were aware of his views for well over a year before the Review-Journal article was published, but as Hoch reportedly stated in the article, "nothing ever happens." His internal complaints to management were largely ignored, if not downplayed or rejected outright. Corrective action commenced and Hoch's views were solicited, not based on his input to CCHD, but in response to the embarrassment CCHD management experienced under the glare of the Review-Journal piece. Obviously, when an employer is essentially forced to initiate corrective measures by external forces, such as the NRC, the EPA, or unfavorable, critical press coverage attributable to the disclosures of an employee, the employer's

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[2] This observation is not offered to shift the burden of proof to the Employer, but rather to note that the Employer, having cited a case it considers analogous to this matter, lacks an essential record fact necessary to complete its analogy.

belated remedial efforts are not plausibly indicative of the absence of a retaliatory motive, and Hasan, Abu-Hjeli, and Smith do not hold to the contrary.

The other decisions CCHD relies upon are equally inapplicable. The Miller decision, for example, has no real pertinence to the issues involved here since the fitness for duty examination ordered by complainant's supervisors was based on her comment that she was having "strange thoughts about the gun she was wearing." The ARB had no difficulty agreeing the fitness exam was warranted, and not retaliatory. Finally, Rivers v. Midas Muffler Center, 94 CAA 5 (Sec. 1995), is also inapposite. In Rivers, retaliation was deemed unlikely because the employer anticipated no adverse ramifications from Rivers' disclosures. The reverse situation is evident here. Dr. Ravenholt and his staff had no way to gauge the degree of potential fallout from the disclosures in the article, but to conclude, as the employer plausibly did in Rivers, that CCHD anticipated no adverse ramifications is unwarranted on this record.

Thus, Dr. Ravenholt acknowledged that the press coverage "... was not complimentary to the District's management...." He was admittedly surprised by the magnitude of the potential ERC imbalance mentioned in the article, and noted, "I served at the pleasure of the Board (of Health). If I couldn't take on remedying something that might be that far out of whack, you know, what am I doing in that role?" Dr. Ravenholt voluntarily retired in May, 1998, and there is no evidence this incident played any role whatsoever in his decision. Nevertheless, adverse ramifications from an article uncomplimentary to CCHD management were, at the time, potentially significant for a number of Dr. Ravenholt's key managers, including Sword who had been in charge of the ERC Program since late summer of 1996. Rivers, therefore, is not a controlling authority.

V.
CCHD's EXPLANATIONS

CCHD next rebuffs Hoch's assertions, contending it never abused him. It describes Hoch as a valued employee whose comments actually motivated management to increase its efforts to correct ERC Program flaws, and it cites memos written by CCHD managers commending Hoch for his hard work. David Rowles, Director of Administrative Services, it notes, even recognized Hoch's efforts in developing the ERC Program at a meeting of the Clark County Board of Health. CCHD claims its reaction toward Hoch's interview was wholly benign, never ignoring, rejecting, disparaging, or downplaying his criticism of the ERC database.

Portraying him as disgruntled because he was not promoted to Data Manager, CCHD asserts it merely questioned the bases for Hoch's suggestion to the reporter that uncollected fees could total millions of dollars. Thus, in the view of one supervisor, Hoch was simply being "paranoid," and, of course, a worker's paranoia violates no environmental statute. In all other respects, CCHD advances allegedly valid reasons for each of the actions which form the grounds of Hoch's complaint. I consider its contentions below.

A.
The Assignment to Gilmartin
1.
NSR Training

Although Hoch was hired as Permit Specialist II, he had, by the summer of 1996, never actually engaged in permit writing. At the time Hoch voluntarily left the ERC Program, APCD had two permit Sections, the NRS Section headed by Gilmartin, and the Title V Section supervised by Dr. David Lee. In December, 1997, Hoch requested a transfer to Dr. Lee's Title V Section. Sword and Naylor, instead, transferred him to Gilmartin. In a memorandum dated January 14, 1998, they explained that they "plan to transfer" Hoch to the Title V Section, but "officially" transfer him to the NSR Section so he could develop "the necessary fundamental NSR permitting skills." Thus, the transfer to Gilmartin, CCHD contends, temporarily reassigned Hoch merely for the purpose of training him in the skills he would need to accomplish his mission in the Title V Section. The transfer resulted in no reduction in pay or benefits, and Hoch's fears that Gilmartin would extract her revenge upon him for participating in the grievance against her never materialized. CCHD notes that Gilmartin treated Hoch as a professional, never suspending, demoting or disciplining him in any way; and in October, 1998, Hoch eventually received the transfer he desired to the Title V Section where he presently works.

Now the purpose of this proceeding is not to second-guess CCHD's assessment of the training needs of its staff or its assignment of personnel. There can be little doubt that CCHD would, ordinarily, be free to assign its workers as it sees fit or temporarily transfer a Permit Specialist II to a training position designed to improve the worker's job performance. The evidence here, however, portrays a motivation for the transfer far less benevolent than merely providing job skills training: it reveals that Hoch was transferred in retaliation for the interview; and that violates the Clean Air Act.

2.
The Transfer

Those who transferred Hoch to Gilmartin were aware that Hoch had formally opposed her appointment. Her sympathy with any effort to retaliate against Hoch could reasonably be expected. Eschewing the subtlety of the withheld statement, Sword, it seems, anticipated her enthusiastic help in firing Hoch, advising her that Dr. Kwalick, then the second highest ranking executive at CCHD, actually wanted him fired. While Sword testified that he could not recall telling Gilmartin of Dr. Kwalick's desire, he did not specifically refute her recollection; and Dr. Kwalick, now Dr. Ravenholt's successor, was not called to testify. In contrast, Gilmartin's testimony was specific and credible, and it stands unchallenged on this record.

Moreover, whether or not Dr. Kwalick actually expressed the sentiment Sword attributed to him, the record shows, and I conclude, that Sword led Gilmartin to believe if she sought to terminate Hoch, with justification of course, her action would be consistent with the wishes of the Assistant Chief Medical Officer. Lest she harbor reservations, Sword further signaled his own support by advising her that he was hired to fire people, or "clean house" as he may have expressed the idea, especially those who participated in the grievance, thus referring to Hoch without mentioning his name.

While Sword testified that he discussed how Gilmartin should supervise Hoch only in the context of reservations she initiated about Hoch's assignment to her Section, I am not persuaded his testimony is credible. Gilmartin's recollections of Sword's comments are vivid even if Sword is unable to recall his remarks. Further, informing her that one of the top executives at CCHD wanted Hoch fired is not the type of comment I believe an Assistant Director at APCD would routinely convey to a section chief regarding the assignment of so "valuable" a subordinate as Hoch. The fact that it was made at all, I find, is not consistent with the notion Sword was simply responding to Gilmartin's concerns about supervising Hoch. To the contrary, the message was neither vague nor ambiguous, and Gilmartin confirmed that no one before had ever defined the terms under which she should fire anyone, let alone impart an upper echelon impulse to target a subordinate.

The record shows a climate at CCHD immediately following the Review-Journal interview conducive, at least up to the level of the Assistant Chief, to fire Hoch, and who better among the supervisors to accomplish such a mission than Gilmartin, who after all, only a year and a half before, suffered considerable unpleasantness as the object of Hoch's grievance.[3]

3. Surreptitious Surveillance In Furtherance of Retaliatory Action

Furthermore, because Sword, Rowles, Munninger, and perhaps Naylor and Dr. Kwalick apparently misjudged Gilmartin's desire for revenge and the steps she might be relied upon to take to usher Hoch's removal, she was given tools a more vindictive supervisor would have found quite useful. The record shows that Jon Reed, acting under orders from Munninger and Rowles, gave Gilmartin Hoch's computer passwords. The message she received with the passwords indicated they permitted "2 concurrent connections," which she understood allowed her to log on remotely and surreptitiously monitor what Hoch was doing on his computer.

To be sure, Hoch established no right to privacy for any information he or any other co-worker keyed into the employer's computer. Consequently, no inference can be drawn that the employer's efforts to surreptitiously monitor a staff member's work is inherently improper. Nevertheless, under circumstances in which surveillance is singularly focused on a protected worker as part of a scheme to fire him or her, it exceeds management's prerogatives.

In this instance, although Munninger initially denied that the passwords gave Gilmartin greater access to Hoch's files than other supervisors were given to probe the files of their subordinates, he later recanted. Munninger acknowledged that supervisors did not routinely have access to their employee's last-name files unless requested by the employee, and it is undisputed that Hoch made no such request. Munninger also denied the passwords allowed Gilmartin, despite her belief to the contrary, to monitor Hoch's keystrokes or spy on work he was currently entering into his computer, although he acknowledged she could log on as Hoch and peruse files not then open. He explained that Hoch was complaining that he could not access network programs and certain files, and the passwords were given to Gilmartin solely for the purpose of allowing her to verify exactly what was available to Hoch.

The record shows that Gilmartin never used Hoch's passwords in an attempt

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[3] While Dr. Ravenholt testified that he thought Hoch's transfer was innocuous, believing he would be unhappy in the Title V Section without prior permit training, there is no evidence that Dr. Ravenholt knew Gilmartin had been told that his Assistant Chief, and soon to be successor, wanted Hoch fired.

either to monitor his work or verify his access to the network. Consequently, whether the passwords actually afforded her the ability to monitor Hoch's activity as he worked on his computer is not established on this record. Yet, the notion that she was given passwords permitting remote access to Hoch's first and last-name files solely for the purpose of verifying what network programs and files he could access is not credible.

Gilmartin testified that she verified the limits of Hoch's access in his presence at his workstation. Hoch's passwords were not needed for that limited purpose. Moreover, Administrative Services did not need Gilmartin to verify Hoch's access. Munninger had the passwords and the facilities to use them to verify exactly the information he allegedly wanted Gilmartin to secure. If Munninger wanted to simply verify Hoch's access to the programs and files on the APCD network using the passwords he gave to Gilmartin, he could have logged on as Hoch directly and obtained the verifications he needed or he could have done as Gilmartin did and visit Hoch's work sight.

Gilmartin further testified she was asked to use the passwords to monitor Hoch, an allegation Munninger specifically denied, but it strains credulity to believe the passwords were given to Gilmartin solely to verify Hoch's computer access. In the context of Sword's remark that Dr. Kwalick wanted Hoch fired, the ability to examine all of Hoch's computer files remotely and surreptitiously could prove rather helpful, if not to an Administrative Services Manager with no authority over Hoch's substantive work, then certainly to a properly motivated front-line supervisor; and significantly, at the time the passwords were shared with her, no one at CCHD had reason to doubt Gilmartin's likely displeasure with her new subordinate or her willingness to document "sufficient cause" to terminate his employment.[4]

Yet, eschewing obvious incongruities, CCHD now extolls Gilmartin's neutrality as evidence that the transfer to her Section was simply a benign attempt to train Hoch, even as her ultimate unwillingness to participate in Hoch's unbraiding allegedly induced CCHD to retaliate against her.[5] While Gilmartin's prudence and restraint serves to mitigate CCHD's damages, it was not the result anticipated by

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[4] This surveillance is not included in Hoch's complaint as a separate claim of discrimination. It is, however, an element of the overall discriminatory treatment he experienced.

[5] The acts of retaliation alleged by Gilmartin were set forth in a CAA complaint which she filed with OSHA. CCHD and Gilmartin have since reached a settlement of her charges.

those who executed the transfer when the decision to assign Hoch to her Section was rendered, and it does not relieve CCHD of liability. For all of the foregoing reasons, I find that Hoch's assignment to Gilmartin by Sword and Naylor was an act of retaliation, even though Gilmartin herself did not act in a vindictive manner.

Nor do I find this transfer indicative of a "dual motive" situation. The record shows not only that two new employees, Dan Fisher and Scott Jelenik, were hired directly into the Title V Section without first training in the NSR Section, but, urgent staffing needs notwithstanding, it significantly fails to show that any other Permit Specialist in the Title V Section ever went through NSR Section training. Hoch was singled out for special treatment which, despite Dr. Ravenholt's perception, was not intended for the benefit of either Hoch or the Title V Section by those who advanced the training idea to Dr. Ravenholt. *See*, O'Brien v. Stone & Webster Engineering Corp., 84 ERA 31(ALJ, 1985) pg. 14, Ord. Approving Settlement (Sec., 1990). Since training was the pretext for cycling Hoch through the NSR Section, under the supervision of a superior who could be expected to act favorably upon the wishes of those who wanted Hoch removed, "dual motives" are not an issue here. Francis v. Bogan, Inc., 86 ERA 8 (Sec. 1988). Considering the record evidence viewed in its entirety, I conclude Hoch was assigned to Gilmartin by Sword and Naylor in retaliation for his Review-Journal interview.

B.
Statute of Limitations
1.
The Transfer

CCHD argues that the Clean Air Act, Section 7622 (b)(1), required Hoch to file his complaint within 30 days of the date he was transferred to Gilmartin. Since his transfer was effective January 14, 1998, and Hoch did not file his complaint until April 1, 1998, CCHD demands that the claim of discrimination based upon the transfer be dismissed as barred by the Statute of Limitations.

As CCHD correctly notes, the limitation period begins when a reasonably prudent employee would know or should have known that an adverse employment decision was discriminatory in nature. McGough v. U.S. Navy, 86 ERA 19 (Sec. 1993). The record reflects Hoch's concern about the transfer to Gilmartin, but a reasonably prudent employee, in his position, could well be lulled into inaction by the mixed signals he received.

Although he had filed a grievance against Gilmartin's appointment and offered comments to the press critical of the ERC Program, the memo transferring him to Gilmartin drafted by Sword and Naylor never betrayed any hint of the undercurrent of forces then working against his continued tenure. To the contrary, the memo writers praised Hoch respectfully and thanked him "for the hard work and effort you have put into compliance data management." They assured him that, "[a]s your skills continue to expand, I look forward to the excellence in product that your presence will help to achieve." With what in the context of this record is revealed as an empty encomium, overladen with pure puffery, they urged Hoch to believe he could, with a little training, expect that transfer he wanted to the Title V Section, while contemporaneously his new supervisor was quietly being urged to believe that Assistant Chief Kwalick wanted Hoch fired.

To be sure, Hoch, after his Clean Air Act complaint was filed, eventually transferred to the Title V Section as he requested; but this subsequent personnel action does not vitiate the underlying retaliatory nature of his assignment to Gilmartin. For purposes of CCHD's Statute of Limitations defense, it is relevant that Hoch may have indeed sensed the retaliatory nature of the transfer, but his initial deference to his supervisors' explanations was not unreasonable. Nevertheless, even assuming he was unduly credulous in accepting Sword and Naylor's praise and their proffered reasons for the allegedly transitional assignment, the Statute does not otherwise bar Hoch's claim.

2.
Pattern of Discriminatory Conduct

As CCHD recognizes, when a course or pattern of discriminatory conduct is alleged, the statutory period begins on the day of the last discriminatory act, provided (1) the prior acts involve the same subject matter, (2) the acts are recurring, not isolated decisions, and (3) they involve a degree of permanence. *See*, Berry v. Bd. Supervisors of LSU, 715 F.2d 971, 979 (5th Cir. 1983); Thomas v. Arizona Public Service Co., 89 ERA 19 (Sec. 1993). Hoch, CCHD reasons, fails the test of a continuing violation because, in its view, the transfer shares no common subject matter with the computer restrictions later imposed, the NSR transfer was an isolated decision, and was permanent in the sense that the decision to transfer Hoch on a temporary basis was a permanent decision. *Compare*, Gilliam v. Tennessee Valley Auth., 92 ERA 46, 50 (Sec., 1995), *with* Thomas v. Arizona, *supra*. These arguments are not persuasive.

In most instances, as the foregoing cases demonstrate, evidence of a continuing violation linking various adverse employment actions to a common subject requires the trier of fact to piece together disparate circumstantial factors. In this instance, the link between the transfer to Gilmartin and the computer restrictions Hoch experienced is direct. The transfer and the computer restrictions are not isolated occurrences, but interrelated actions, part and parcel of a single, continuing effort to retaliate against Hoch for his disclosures to the Review-Journal. The transfer to Gilmartin, under the guise of a training maneuver, placed him under a supervisor whose antipathy could, at the time the transfer was consummated, be expected by those who ordered it. Indeed, the desire of mid-level managers to get rid of Hoch, candidly communicated to Gilmartin, weaves these adverse actions into a continuing course of misconduct. By severely restricting Hoch's access to the APCD computer resources he needed to do his job, Hoch's ability to perform for this new supervisor was severely hampered. For those who wanted Hoch fired, if justified of course, poor work output for a hostile supervisor could serve nicely to achieve the desired goal, if not during Dr. Ravenholt's tenure, then upon his foreseeable departure.

CCHD also contends that the decision to transfer Hoch was permanent although the transfer itself was not. This exercise in semantics overlooks the true nature of the action. The assignment to Gilmartin was allegedly temporary as a training exercise, and for purposes of tolling the statute, the assignment usually is the relevant factor. *See*, Berry, *supra*; Nathaniel v. Westinghouse Hanford Co., 91 SWD 2 (Sec. 1995). Yet in a more significant way, this transfer harbored the requisite element of permanence in the sense that mid-level managers with sufficient authority to cause Hoch serious personnel problems took steps intended to make this assignment Hoch's last at APCD. Since both the transfer and the restrictions placed on Hoch's computer on March 4, 1998, were inextricably intertwined elements of a continuing effort to get rid of him, his April 1, 1998, complaint challenging both was timely filed under CAA, Section 7622(b)(1).

B.
Restricting Hoch's Computer Access to CCHD Programs and Files

1.
Security Concerns

Hoch contends that CCHD removed the Access 7 program which included the ERC database from his computer and restricted his access to CCHD computer network resources in March of 1998 in further retaliation for his protected activity. CCHD rejects this assertion. In its view, Hoch is simply overreacting to necessary steps CCHD was compelled to implement to cure the numerous, and demonstrable, computer problems it was experiencing in its operations.

The record indeed documents convincingly the numerous problems CCHD's Administrative Services Section was called upon to address during the period from November, 1997, through March 3, 1998. As computer support personnel ubiquitously come to appreciate, and as Munninger and his staff can surely confirm, user indifference, ignorance, and sometimes treachery, only exacerbate the routine glitches and crashes which computer technicians everywhere daily struggle to fix. Munninger's shop, on any given day, has between 50 to 75 pending computer repair work orders (DPSR). Missing software, unauthorized program installations, databases with illogical and circular links, viruses, hardware cabling problems, and occasional acts of suspected sabotage, only partially capture the range of obstacles which plagued the progress of staff members working to implement Dr. Ravenholt's directive to install the ERC database on the central computer.

Inevitably, the need for increased security surfaced as an issue, and the environmental acts ordinarily play no role in defining the steps an employer may take to protect its operations from inadvertent or unauthorized manipulation. Munninger, for example, in a January 31, 1998 memorandum explained that security of the APC database was tightened to restrict APC staff access to the extent "defined by Mike Sword." A security question again arose on March 3, 1998, when a programmer, Paul Orillion, assigned to maintain the APCD billing database on the Access 7 program, returned from lunch to find he could not regain access to his work. Following an investigation, Munninger determined that someone deleted the database from the file server while Orillion was at lunch and replaced it with a file according access rights assigned to "unknown."

The next morning Munninger met with Sword to inform him about the destructive tampering which locked-out Orillion the previous day. Approximately one hour later, Hoch's computer was seized and the Access 7 program removed. CCHD now argues in its brief that not only did Hoch fail to demonstrate any discriminatory intent underlying its removal of Access 7 from his computer, but it affirmatively demonstrated legitimate reasons for its actions. Upon careful review, the evidence fails to support these assertions.

The record shows that, although CCHD managers did not consider Hoch a particular security risk or accuse him of committing any of the acts of sabotage which gave rise to their concerns, he was the first and only employee to experience computer reprogramming which barred opening Access 7, and Sword and Munninger disagree in their explanations of how that came to pass.

2.
Removal of Access 7
a.
Conflicting Explanations

Sword testified that, during his meeting with Munninger, he suggested as a security measure that the availability of the Access 7 program be removed from the computers of all staff members who did not need the ERC billing database to perform their jobs. Because this involved a large number of machines, the alleged plan was to remove Access 7 as each computer was brought in for ordinary service, starting with the DPSR's then-pending in Munninger's shop, and by coincidence according to Sword, Hoch's computer just happened to be first.

According to Munninger, however, he and Sword determined during their meeting that Hoch had a pending DPSR, and "we decided to start out with that...." Munninger claims Sword told him to begin with Hoch's computer. Sword, however, denies any recollection of directing Munninger to start with Hoch's machine, and testified he was totally unaware that Hoch had a DPSR pending at the time he met with Munninger on March 4. Sword explains the selection of Hoch as essentially a random coincidence. Thus, CCHD's brief would have us believe, contrary to Munninger's direct testimony, that Hoch's DPSR, submitted almost three weeks before, had simply migrated to the top of the 50 to 75 or so pending DPSR's. CCHD Br. at 12. I find otherwise.

Although Sword may deny or not recall his directive to Munninger, Hoch's DPSR did not simply "come to the top of the pile." It was culled from the pile. Munninger's recollection in this respect is clear, unequivocal, and credible. Sword told him to start with Hoch's computer and reprogram it, and he did. Hoch's computer was selected for reprogramming in a discriminatory manner.

b.
Implementation of Security Measures

CCHD next addresses the seemingly limited scope of its effort. While Hoch's computer was the only machine sanitized by the removal of Access 7, CCHD offers assurance the reason is not ominous. Hoch, it claims, was not singled out. The plan to remove Access 7 would have proceeded to others, it contends, had Dr. Ravenholt not interceded to halt further reprogramming.

The record shows Dr. Ravenholt, who never specifically approved Sword's plan, but generally wanted his staff to remedy the computer problems in APCD, received information from Gilmartin on March 6 that Hoch was "very disturbed," about the reprogramming. As a result, he met with Hoch that day to diffuse the situation and reassure him that his job was secure. Subsequently, on a date not disclosed in this record, Dr. Ravenholt directed that Access 7 be restored to Hoch's computer. As Sword would later testify, " I got overruled by Dr. Ravenholt."

While the notion that a wide-ranging plan was devised to remove Access 7 from virtually all staff computers is supported by the testimony of Sword and Munninger, other indications cast doubt upon the scope of this initiative. Dr. Ravenholt's intervention, for example, fails to address otherwise probative aspects of this scenario: the urgency with which Sword and Munninger implemented the alleged security plan on March 4, culling Hoch's DPSR from scores of pending repair orders, securing possession of Hoch's computer, and reprogramming it on a priority basis within hours of their meeting. Days then pass without a single instance of another reprogramming. Indeed, Dr. Ravenholt did not learn of Hoch's complaints until March 6; and although the record does not disclose the day he overruled Sword's plan, it may be inferred he did not act before March 6.

It is, of course, possible none of the other 40 or so employees whose computers were allegedly targeted for security reprogramming had DPSR requests pending among the scores of requests awaiting attention each day, however, it seems improbable in light of the myriad of hardware and software problems which, as APCD itself has emphasized, plagued its computer operations. Nevertheless, as Munninger testified, the pile of pending DPSR's on March 4 was culled until Hoch's repair order was uncovered.

After locating Hoch's DPSR with earnest, swift efficiency, the alleged security initiative apparently took a decidedly listless tack. Thus the record fails to document any effort on March 4 or 5 to extend the search of the DPSR's to determine, before Dr. Ravenholt intervened, whether any of the other forty or so allegedly affected staff members had, like Hoch, a pending DPSR. What these circumstances suggest inferentially, Munninger's testimony addresses more directly: Hoch's computer alone was targeted for the removal of Access 7.

c.

Dual Motive

Now the Secretary has deemed it error to engage in a "dual motive" analysis under circumstances in which an employer's proffered justification is deemed a pretext for its action. Francis v. Bogan, Inc. 86 ERA 8 (Sec., 1988); *See*, McCuistion v. Tennessee Valley Auth., 89 ERA 6 (Sec., 1991); Shusterman v. Ebasco Services, Inc., 87 ERA 14 (Sec., 1993). Although the alleged security reasons for the removal of the program, Access 7, from Hoch's computer alone are not well founded, I have entertained CCHD's "dual motive" argument and analyzed it in the context of this record.

Since Hoch has established that discriminatory intent played a role in the removal of Access 7 from his computer, CCHD may avoid liability for this adverse action by demonstrating that it would have reprogrammed Hoch's computer in the same way solely for legitimate security-motivated reasons. Mt. Healthy Sch. Dist. v.Doyle , 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Zinn v. Univ. of Missouri, 93 ERA 34, 36 (Sec. 1996). In a "dual motive" situations, the record must demonstrate that the employer would have taken the same initiative for legitimate reasons alone. *See*, Martin v. Dept. of the Army, 93 SDW 1 (Sec., 1995). Highly relevant in this regard is evidence of the impact and effect of the security measures on similarly situated co-workers who did not engage in protected activity. O'Brien, *supra*; Pogue *v*. U.S. Dept. of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991); *See also*, Pensyl v.Catalytic Inc ., 83 ERA 2 (Sec. 1984) at pg. 9; Mackowiak, *supra*, at 1162.

There can be little doubt that CCHD would, ordinarily, be justified in taking the steps it deemed necessary to secure its computer operations. A security response may justify seemly harsh tactics, and certainly, when imposed generally, raises no inherent concern under the act. But security measures targeting an employee who has engaged in protected activity require close scrutiny; and when focused in a discriminatory manner to the detriment of a protected worker in retaliation for protected activity, they violate the law.

In this instance, the testimony of CCHD witnesses confirms that Hoch was not deemed a particular security risk. The security concerns of management were general in nature. The Orillion lock-out certainly heightened those concerns, and rightfully so. The record, however, provides only superficial plausibility for the total removal of Access 7 from Hoch's computer, especially in light of evidence that he needed it to perform his job. The record shows that certain Access 7 security files were removed from some staff computers and that, absent retaliation, Hoch may have experienced similar, limited reprogramming of his Access 7 security files, but not removal of the entire program. Such unjustified, disparate treatment of a protected worker is crucial evidence that an otherwise plausible explanation is but a mere pretext, O'Brien, *supra,* and Hoch has satisfied that burden.

Moreover, even if security objectives were, in part, a motivating factor for some of the limitations imposed upon Hoch, CCHD still incurs the risk if legal and illegal motives which underlie its actions merge and become inseparable. Passaic Valley, *supra* at 476, 478. Here, at best, they are intertwined inextricably. The evidence fails to support CCHD's assertion that the entire Access 7 program would have been removed from Hoch's computer for security reasons alone devoid of any discriminatory intent. Consequently, CCHD's proffered security justification is manifestly inadequate. Mandregger v. The Detroit Edison Co., 88 ERA 17 (Sec. 1994); Passaic Valley, *supra*.

c.
Removal of Network Privileges

Hoch also complained not only that Access 7 had been removed, but that his network privileges were severely restricted when his computer returned from Munninger's workbenches. Sword testified that Hoch's complaints in this regard puzzled him because the reprogramming never involved any circumscription of network privileges. CCHD's post-hearing brief reiterates this argument, but the record simply contradicts it.

Munninger, whose staff performed the reprogramming, specifically testified that Hoch's network access was circumscribed to his own personal directory and to the NSR tracking files based on a list "obtained from APCD management." Although Munninger's staff started working on Hoch's computer within about one hour of Munninger's March 4 meeting with Sword, Sword denied giving Munninger a list at their meeting and had no recollection of ever preparing a list. Yet, whether it was Sword or someone else, APCD management provided Munninger with a list of files to delete from Hoch's computer, and he saw to its use.

Munninger candidly conceded, when called as a witness by CCHD, that he required the assistance of Sword or a line supervisor in determining precisely which programs particular staff members needed to perform their work. His was a support mission. There is no indication in this record that he has any substantive authority over the NSR staff, in general, or Hoch, in particular.

Moreover, suggestions to the contrary notwithstanding, I do not believe

Munninger acted alone in this matter. Nor did he begin deleting programs from another supervisor's employee without consulting the affected supervisor or receiving a mandate from higher authority. In this instance, he received his instructions from "APCD management." Munninger sought, as he acknowledged in testimony, help in identifying which of Hoch's network programs and files to delete, and Munninger testified persuasively that he received it. While Sword denied any awareness of "any restrictions on his (Hoch's) network accessibilities," thus clarifying that deletion of network access other than the Access 7 program was

not part of the March 4 security plan he formulated, someone in APCD management other than Munninger was not only aware of the additional restrictions, but assisted Munninger in defining and imposing them.

The plan to remove Access 7, allegedly precipitated by the Orillion lockout and formulated by Sword in response, thus fails to explain Hoch's inability, as confirmed by Gilmartin, to open his other network programs. Apparently noting this discrepancy in its evidence, CCHD, in its post-hearing brief, suggests that the other programs were removed in accordance with security steps implemented in January of 1998. While no witness came forward at the hearing to substantiate that rationale, I have reviewed the record for evidence otherwise supporting it.

I am, of course, mindful of Munninger's January 31, 1998, memo to Rowles stating that APC staff "*has been* granted access to the database to the extent defined by Sword." (Emphasis added). Obviously, the task to which Munninger referred was accomplished by the time he wrote the memo. Moreover, Sword claimed he was puzzled by Hoch's inability to access the network. He claims he discussed Hoch's network problems with Munninger, yet Munninger apparently never admitted to Sword he changed Hoch's network access pursuant to a January security plan. Had he done so, Sword would not likely have testified that he was "puzzled" by Hoch's network problem. I conclude, contrary to CCHD's proffered explanation, that Munninger failed to mention a January, or any other, security plan to Sword because that was not the scenario which guided Munninger's action in March. To the contrary, the record shows the impetus for this aspect of the reprogramming originated elsewhere, as did the list of programs Munninger used to accomplish the task.

Moreover, Hoch was singularly impacted by the drastic limitations imposed on his network privileges at the direction of a management source this record does not specifically identify, but who occupied a position sufficiently authoritative to secure the full cooperation of the Manager of Administrative Services. While the alleged security justifications proffered by CCHD would seem, on the surface, to provide adequate reasons for the adverse actions here taken, upon closer review, it is apparent the proffered justifications for the limitations imposed on Hoch's network access are seriously conflicted, ranging from a suggestion that it was purely the type of glitch everyone at APCD experienced from time to time to a purposeful deletion consistent with a designed security plan. Shifting explanations detract from the credence a proffered justification might otherwise warrant. In these respects, CCHD's explanations are not credible. *See*, Creekmore v. ABD Power Systems Energy Co., 93 ERA 24 (Sec. 2/14/96).

The record demonstrates that Sword, Munninger, and other unidentified managers sought with focused intensity to deprive Hoch of computer resources without regard for the access he needed to perform his job. Under a cloak of security, clearly justified in a general sense if imposed generally, measures were directed against a protected worker in an unjustified, retaliatory, and discriminatory manner, which affected him alone in violation of the Clean Air Act. Pogue, *supra*. "Dual motives" are not an issue here; security was a pretext for the broad restrictions placed on Hoch's network access. *See*, O' Brien, *supra*; Bogan, Inc., *supra*.

d.
Conclusions

Upon consideration of the record viewed as a whole, I conclude that Hoch has satisfied his burden through both direct and circumstantial evidence which demonstrates that retaliation was, more likely than not, the key factor in management's decision to assign him to a position under the supervision of Elizabeth Gilmartin and to restrict his access to various APCD computer programs and files. Leveille v. New York Air National Guard, 94 TSC 3-4 (Sec. 1995). The mid-management level plan of action, although ill-conceived, was well underway in March, 1998, and sanctioning Hoch was its prime objective. Only Gilmartin's restraint and the intervention of Dr. Ravenholt mitigated matters.

V.
DAMAGES

Hoch seeks back pay with interest for the month of April, 1998, when he took an unpaid leave of absence, thirty to forty thousand dollars in compensatory damages for pain and suffering, humiliation and frustration during the four-month period prior to filing his complaint, and emotional distress caused by the retaliation to which he was subjected. Hoch also requests attorney's fees and costs, and an order requiring abstention from further acts of retaliation with a provision for punitive damages in the event of future retaliatory acts.

The record shows that although she was invited to participate, and indeed was expected, as Hoch's direct supervisor, to play a key role in the effort to undermine Hoch's job performance, Gilmartin never took any action even remotely indicative of retaliation. Gilmartin treated Hoch like any other employee to the alleged displeasure of those who wanted him fired. Yet, Gilmartin's restraint, to her own personal detriment, substantially benefitted CCHD by mitigating its liability to Hoch.

Indeed, it was Gilmartin who alerted Dr. Ravenholt on March 6, 1998, of Hoch's complaints about the reprogramming of his computer. Dr. Ravenholt subsequently met twice with Hoch to alleviate his concerns and assure him that he regarded him as valuable member of his staff whose job was secure as long as he was in charge. Hoch confirmed that these meetings, unlike the meeting convened in by the Employer in O'Brien, supra at pg. 11, were neither hostile nor threatening. As noted previously, the record here is baron of any evidence suggesting that Dr. Ravenholt was aware Gilmartin had been told that his assistant, Dr. Kwalick, wanted Hoch fired; and while I have found less than credible the similar assertions of others, I believe Dr. Ravenholt's assurances were sincere. Through his personal involvement in the matter, reversing Sword's decision to remove Access 7 from Hoch's computer, Dr. Ravenholt further mitigated the consequences of the violation which were, by the time he intervened, well underway.

As a result of the actions of Gilmartin and Dr. Ravenholt, the availability of Access 7 was restored and Hoch's network privileges resumed shortly after he returned from his one-month leave of absence. Although he experienced retaliation-induced emotional distress, he suffered no decrease in pay or benefits, except to the extent discussed below, no disciplinary action, and eventually received the transfer he sought to the Title V Section. Such factors are relevant in assessing Hoch's damages and CCHD's liability. *See,* Smith v. Esicorp, Inc., 93 ERA 16, *supra*; Thomas v. Arizona Public Service Co., *supra*.

A.
Back Pay and Benefits

The record shows that Hoch's request for the one-month leave of absence he submitted on March 12, 1998, was a direct result of the emotional tumult and frustration he suffered as a consequence of the illegal retaliation. Hoch candidly acknowledged in testimony that the leave was not urgently needed for medical reasons, and that he was able to perform his work between March 12, when the request was submitted, and April 1, when the leave commenced. Yet, the case law does not require an employee's complete debilitation or mental breakdown before the emotional trauma of an unlawful job action is compensable. Nor does it require expert medical evidence to substantiate credible testimony of emotional distress under circumstances in which an ordinary person could be expected to manifest a similar reaction. Marcus v. EPA , 92 TSC 5 (ALJ, 1992) *aff'd.* (Sec., February 2, 1994, pg. 10). Hoch requested a month of leave, which was granted on condition he use his annual leave first, then incur leave without pay for the duration, to recuperate emotionally and reassess his future. His need for the leave, linked directly to the retaliation he experienced, is reasonable and compensable. Even though Dr. Ravenholt was unaware of the actions of his subordinates which necessitate this relief, back pay with interest along with restoration of leave and benefits for this period is appropriate. Hoch is also entitled to reasonable attorney's fees and costs, and a ceases and desist order barring future retaliation.[6] Blackburn v. Metric Constructors, Inc., (86 ERA 4 (Sec. 10/30/91); Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983).

B.
Compensatory Damages

Applicable precedents establish that compensatory damages may be awarded, upon the credible testimony of the complainant, for psychological injury, mental pain and anguish, and humiliation caused by an unlawful adverse personal action. Medical, psychiatric, or expert psychological analysis is unnecessary. Busch v. Burke, 649 F.2d 509, 519 (7th Cir., 1981) cert. denied, 454 U.S. 817 (1981); DeFord, *supra*; Doyle v. Hydro Nuclear Services, *supra*; Mosbaugh v. Georgia Power Co., 91 ERA 1 (Sec. 11/20/95); Thomas v. Arizona Public Services Co., 89 ERA 19 (Sec. 9/17/93). Indeed, a complainant's credible testimony establishing his emotional distress, alone, without any concomitant financial hardship, may be sufficient to support a compensatory damage award. *See*, Blackburn v. Reich, 982 F.2d 125, 132 (4th Cir., 1992).

Hoch seeks thirty to forty thousand dollars in compensation for his injuries, and, as discussed above, it is well settled that such damages are available under the Act and the regulations. DeFord v. Secretary of Labor, supra. Damages in the

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[6] Hoch also seeks an order authorizing punitive damages for violations which post-date the actions which are the subject of this complaint and for any future violations. Yet, if further violations are established in future proceedings, or if CCHD should violate any provisions of the order herein entered, appropriate relief may them timely be considered. Authorization for punitive damages is, at this time, unnecessary.

amount Hoch demands, however, are inappropriate in this context. I have reviewed the level of damage awards in a number of cases involving retribution against protected workers. While awards in the range Hoch here seeks are not unusual, the duration and severity of sanctions the workers suffered in those instances surpass anything Hoch experienced.

In LaTorre v. Coriell Institute, 97 ERA 46 (ALJ 1997), *damage award aff'd* (ARB, February 26, 1999), for example, compensatory damages in the amount of $26,500 were awarded to a protected employee who suffered financial hardship, depression, and anxiety as a consequence of an unlawful decision to terminate his employment. In Marcus v. EPA, 92 TSC 5 (ALJ, D & O, 12/3/92) an award of $50,000 compensatory damages, in addition to back wages and other relief, was entered upon evidence of "mental and physical anguish," financial hardship, and depression suffered by a worker subjected to a hostile work environment and eventual termination. On appeal, the award of compensatory damage was affirmed by the Secretary. Marcus v. EPA, (Sec. 2/7/94 at pg. 10). In Gaballa v. The Atlantic Group, Inc., 94 ERA 9 (Sec., 1/18/96), a compensatory damage award of $35,000 was entered for the severe mental suffering and emotional stress, pain, and anguish caused by the release of confidential personnel information in an attempt to blacklist a covered worker. In Creekmore v. ABD Power Systems Energy Co., 93 ERA 24 (Sec. 2/14/96), an award of $40,000 was entered by the Secretary for an employee who was laid-off and suffered financial injury. In contrast, an award of $100,000 was entered in Smith v. Esicorp, Inc., 93 ERA 16 (ALJ, 2/26/97), for a worker who experienced harassment and severe emotional distress, but later reduced to $20,000 by the Administrative Review Board on appeal. (96 ERA 16, ARB 1998). Finally, in Blackburn, *supra*, the Court reversed a determination by the Secretary to deny compensatory damages for emotional distress alone. The Secretary had vacated an award of $10,000 entered by the trial judge. On remand from the Court, the Secretary then entered an award of $5,000 for injury caused by the employer's violation. Blackburn v. Metric Constructors, Inc., 86 ERA 4 (Sec., Aug. 16, 1993).

Having considered the record as a whole, I am unable to conclude that damages in the range Hoch seeks are reasonable. Considering Hoch's damages in the context of other similar cases, I find that, although CCHD's retaliation constitutes a serious violation of the CAA, Hoch's injuries were substantially mitigated by Gilmartin and Dr. Ravenholt who acted to put a halt to the abuses he endured. While not necessarily vitiating all damages, it certainly serves to mitigate them. Under these circumstances, I find that Hoch is entitled to compensatory damages in the mitigated amount of $10,000 for emotional distress, humiliation, mental pain, and anguish caused by the retaliatory transfer and discriminatory restrictions imposed on his access to CCHD's computer programs and files. He feels his career has ended, believes he has no future at APCD, senses his co-workers are

skeptical of him, worries that potential employers would shun him as a whistleblower, and "agonizes" with his wife "over these things quite often." Having considered his emotional distress in the context of the record evidence viewed in its entirety, I conclude the amount here awarded, although substantially less than Hoch demands, is nevertheless consistent with the damage award entered by the Secretary in Blackburn, recognizing that the passage of nearly 7 years since the Secretary's decision warrants an upward adjustment in the damage award guidance Blackburn provides. *See*, Leveiller v. New York Air National Guard, 94 TSC 3,4 (ARB, 1999), pg. 5.

C.
Attorney's Fees

Hoch further seeks reimbursement for attorneys' fees and costs. While such costs are, as previously mentioned, recoverable by successful complainants, a caveat requires counsel to show they were "reasonably incurred." Accordingly, counsel must document costs and fees. DeFord v. TVA, 81 ERA 1, (Sec., June 30, 1982 and April 30, 1984). Since no documentation of fees or costs has been submitted in this matter, an assessment of reasonableness cannot be made. Hoch's attorneys will, therefore, be afforded an opportunity to submit an application for fees, together with supporting data, including, *inter alia*, their professional expertise with regard to whistleblower and similar matters, an itemization of the hours expended on complainant's behalf in this case, their customary hourly billing rates, and an itemization of costs. DeFord, *supra*. Accordingly:

ORDER

IT IS ORDERED that Clark County Health District:

1. Forthwith pay David Hoch full back wages for the month of April, 1998, with interest, and further restore all benefits to which he would have otherwise been entitled had he not taken the leave of absence;

2. Pay to David Hoch the sum of $10,000 in compensatory damages;

3. Cease and desist from any further acts of retaliation against David Hoch arising out of his protected activity as a covered worker under the Act; and

4. IT IS FURTHER ORDERED that Complainant's attorneys are hereby afforded 30 days from the date hereof to file an appropriate, itemized fee petition. Thereafter, CCHD shall, within fifteen days of receipt of the petition, file its objections, if any.

STUART A. LEVIN
Administrative Law Judge